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Petrodar Operating Co Ltd v Nam Fatt Corp Bhd (in liquidation) & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(i)-64–09 OF 2012 AND 02(i)-65–09 OF 2012
RAUS SHARIF PCA, ZULKEFLI CJ (MALAYA), HASHIM YUSOFF, ZAINUN ALI AND JEFFREY TAN FCJJ
17 OCTOBER 2013

Civil Procedure — Jurisdiction — Forum conveniens — Contract — Whether Malaysian court had jurisdiction to try action — Whether could have jurisdiction statutorily over foreign defendant — Application for injunction — Ad interim injunction — Setting aside — Balance of convenience, issue of — Argument on balance of convenience — Whether could be split into subject matter of separate interlocutory application to set aside ad interim injunction — Whether splitting of argument inappropriate — Whether would result in multiplicity of proceedings and waste of time and costs — Rules of the High Court 1980 O 11 r 1 — Courts of Judicature Act 1964 s 23

The second plaintiff was a subsidiary of the first plaintiff, while the first defendant was an off-shore company and owner projects ('the project') in Sudan. By a joint venture company formed between the second plaintiff and the first defendant, the plaintiffs undertook to construct the project for the first defendant and provided a performance bond ('guarantee') in the sum of USD18m. The guarantee was issued by CIMB Bank ('the second defendant') and both the contract and the guarantee were governed by laws of Sudan. When dispute arose, the parties proceeded to negotiate for a settlement but, while negotiations were pending, the first defendant made a call on the guarantee. According to the plaintiffs, the call was fraudulent and unconscionable and the plaintiffs proceeded to filed a writ and statement of claim against the first and second defendants, respectively. The plaintiffs applied for and obtained an ex parte ad interim injunction restraining the defendants from enforcing the guarantee; an injunction restraining the first defendant from making a call on the guarantee; leave to serve the writ and the relevant order out of jurisdiction and an ad interimorder to preserve the status quo until the disposal of the inter partes hearing. The first defendant averred that the Malaysian court had no jurisdiction to entertain plaintiffs' claim, and was not the forum conveniens for the action, and so, having entered conditional appearance, applied to set aside the concurrent writ of summons, the notice of concurrent writ to be served out of jurisdiction and the leave order to serve out of jurisdiction. The first defendant also applied to set aside the ad interim injunction. The applications were dismissed by the High Court but the application for stay of proceeding was granted pending reference of the dispute

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to arbitration. The Court of Appeal affirmed the dismissal. The issues that arose in the present appeal were whether O 11 of the RHC by itself conferred jurisdiction or was predicated upon s 23 of the Courts of Judicature Act 1964 ('CJA'); whether the balance of convenience test is applicable to performance bond injunctions at an inter partes stage or this can be decided at the earliest possible stage; and whether the High Court, upon staying the suit subject to an arbitration agreement and parties having pursued arbitration proceedings, retains jurisdiction to hear the injunction application on an inter partes basis.

Held, dismissing the appeals with costs:

(1) The first defendant's submission that O 11 cannot on its own confer jurisdiction by virtue of the decision in *Rama Chandran* is misconceived. The Supreme Court in *Malayan Banking Bhd v The International Tin Council & Anor*, in considering whether s 23 of the CJA confers extra-territorial jurisdiction, acknowledged the fact that O 11 of the RHC does confer jurisdiction. Order 11 of the RHC does not only confer jurisdiction but stands independently on its own and is not predicated upon s 23 of the CJA (see para 11).

(2) The decision in *Rama Chandran* centred on the construction of s 25(2) of the CJA and the powers of the court under O 53 of the RHC and does not in any way affect the then Supreme Court's decision in *American Express*. Consequently, the decision in *American Express* was still valid and there is no reason to depart from it. The Court of Appeal was correct in finding that in the context of O 11 r 1 of the RHC, jurisdiction referred to jurisdiction over a foreign defendant and not jurisdiction over the claim. The High Court was not wrong in stating that Malaysian court could have jurisdiction statutorily over a foreign defendant under O 11 r 1 of the RHC as jurisdiction was implicit in its power to grant leave for service out of jurisdiction (see para 20).

(3) This was a proper case for service out of jurisdiction. The present action brought by the plaintiffs fell within O 11 r 1(1)(iii)(i) of the RHC as the action was begun by writ seeking an injunction to refrain the first defendant from receiving the money demanded in respect of the guarantee. Further, the plaintiffs' reliance on O 11 r 1(1)(iii)(i) is proper as the said Order permits the service of a writ out of jurisdiction if the action begun by writ is founded on a tort committed within the jurisdiction. Hence, the Malaysian courts have jurisdiction over the foreign defendant in this case (see para 20).

(4) The High Court and the Court of Appeal, being guided by the principles enunciated in *American Express*, had rightfully embarked upon sound reasoning to ascertain which was the natural forum for trying this case. The performance guarantee was issued in Kuala Lumpur by a Malaysian Bank having a place of business in Kuala Lumpur. The guarantee money

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sought to be restrained by an injunction was at all material times in Malaysia. The demand for the said guarantee money was made in Malaysia. There were various orders made against and in favour of parties by the court having competent jurisdiction within Malaysia (see para 24).

(5) The first defendant and second defendant's agreement to submit to the jurisdiction of the Sudan courts, as provided by cl 8 of the guarantee, was non-exclusive. Further, both the High Court and the Court of Appeal had deliberated on issues pertaining to logistics, costs of proceedings, political climate and geographical constraints in having this matter litigated in Sudan with which we have no reasons to disagree. Thus, the appropriate forum to litigate this action is Malaysia (see para 24).

[Bahasa Malaysia summary

Plaintif kedua adalah subsidiari plaintif pertama, manakala defendan pertama adalah syarikat luar pesisir pantai dan pemilik projek-projek ('projek tersebut') di Sudan. Melalui syarikat usahasama yang dibentuk antara plaintif kedua dan defendan pertama, plaintif-plaintif mengaku janji untuk membina projek tersebut untuk defendan pertama dan memberikan bon pelaksanaan ('jaminan') sejumlah USD18 juta. Jaminan itu telah dikeluarkan oleh CIMB Bank ('defendan kedua') dan kedua-dua kontrak dan jaminan itu telah dikawal oleh undang-undang Sudan. Apabila pertikaian timbul, pihak-pihak terus berunding untuk penyelesaian tetapi, sementara menunggu rundingan selesai, defendan pertama telah membuat panggilan untuk jaminan itu. Menurut plaintif-plaintif, panggilan itu adalah palsu dan tidak berpatutan dan plaintif-plaintif seterusnya telah memfailkan writ dan penyataan tuntutan terhadap defendan-defendan pertama dan kedua, masing-masingnya. Plaintif-plaintif telah memohon untuk dan memperoleh injunksi *interim ex parte* menghalang defendan-defendan daripada menguatkuasakan jaminan itu; injunksi manghalang defendan pertama daripada membuat panggilan ke atas jaminan itu; kebenaran menyampaikan writ dan perintah yang relevan di luar bidang kuasa dan satu perintah interim untuk mengekalkan *status quo* sehingga perbicaraan *inter partes* selesai. Defendan pertama menegaskan bahawa mahkamah Malaysia tidak mempunyai bidang kuasa untuk menangani tuntutan plaintif-plaintif, dan bukan forum conveniens untuk tindakan itu, dan oleh itu, setelah memasuki kehadiran bersyarat, memohon untuk mengetepikan writ-writ saman serentak itu, yang mana notis writ serentak itu disampaikan di luar bidang kuasa dan perintah kebenaran untuk menyampaikan di luar bidang kuasa. Defendan pertama juga memohon untuk mengetepikan injunksi *ad interim*. Permohonan-permohonan itu telah ditolak oleh Mahkamah Tinggi tetapi permohonan untuk penggantungan prosiding telah dibenarkan sementara menunggu rujukan berhubung pertikaian itu untuk penimbangtaraan. Mahkamah Rayuan telah mengesahkan penolakan itu. Isu-isu yang timbul dalam rayuan ini adalah sama ada A 11 Kaedah-Kaedah Mahkamah Tinggi dengan sendiri memberikan bidang kuasa

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atau dijangkakan berdasarkan s 23 Akta Mahkamah Kehakiman 1964 ('ANK'); sama ada ujian imbangan kesesuaian adalah terpakai untuk melaksanakan injunksi-injunksi bon pelaksanaan di peringkat *inter partes* atau ini boleh diputuskan di peringkat seawal mungkin; dan sama ada Mahkamah Tinggi, dengan menggantung guaman itu tertakluk kepada perjanjian timbang tara dan pihak-pihak meneruskan prosiding timbang tara, mengekalkan bidang kuasa untuk mendengar permohonan injunksi berasaskan *inter partes*.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Hujah defendan pertama bahawa A 11 tidak boleh dengan sendiri memberikan bidang kuasa menurut keputusan dalam kes *Rama Chandran* telah disalah tanggap. Mahkamah Agong dalam kes *Malayan Banking Bhd v The International Tin Council & Anor*, dalam mempertimbangkan sama ada s 23 AMK memberikan bidang kuasa di luar wilayah, mengakui fakta bahawa A 11 KMT memang memberikan bidang kuasa. Aturan 11 KMT bukan sahaja memberikan bidang kuasa tetapi berdiri secara berasingan dengan sendiri dan tidak berasaskan s 23 AMK (lihat perenggan 11).

(2) Keputusan dalam kes Rama Chandran berkisarkan pembentukan s 25(2) AMK dan kuasa-kuasa mahkamah di bawah A 53 KMT dan tidak dalam apa cara menjejaskan keputusan Mahkamah Agong pada masa itu dalam kes *American Express*. Berikutan itu, keputusan dalam kes *American Express* masih sah dan tiada sebab untuk menyimpang daripadanya. Mahkamah Rayuan adalah betul dalam penemuan bahawa dalam konteks A 11 k 1 KMT, bidang kuasa yang merujuk kepada bidang kuasa ke atas defendan orang asing itu dan bukan bidang kuasa ke atas tuntutan itu. Mahkamah Tinggi tidak salah dengan menyatakan bahawa mahkamah Malaysia boleh mempunyai bidang kuasa secara statutori ke atas defendan orang asing di bawah A 11 k 1 KMT kerana bidang kuasa adalah tersirat dalam kuasanya untuk memberikan kebenaran bagi penyampaian di luar bidang kuasanya (lihat perenggan 20).

(3) Ini adalah kes yang wajar untuk penyampaian di luar bidang kuasa. Tindakan ini yang dimulakan oleh plaintif-plaintif terangkum di bawah A 11 k 1 KMT kerana tindakan itu dimulakan melalui writ dengan memohon injunksi untuk menghalang defendan pertama daripada menerima wang yang dituntut berkaitan jaminan itu. Selanjutnya, kebergantungan plaintif-plaintif kepada A 11 k 1(1)(iii)(i) adalah wajar kerana aturan tersebut membenarkan penyampaian writ di luar bidang kuasa jika tindakan dimulakan melalui writ didapati berasaskan tort yang dilakukan dalam bidang kuasa. Justeru, mahkamah Malaysia mempunyai bidang kuasa ke atas defendan orang asing dalam kes ini (lihat perenggan 20).

(4) Mahkamah Tinggi dan Mahkamah Rayuan, berpandukan

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prinsip-prinsip yang dinyatakan dalam kes *American Express*, telah memulakan dengan wajar berasaskan alasan yang kukuh untuk menentukan forum semula jadi untuk membicarakan kes ini. Jaminan pelaksanaan dikeluarkan di Kuala Lumpur oleh bank Malaysia yang mempunyai tempat perniagaan di Kuala Lumpur. Wang jaminan yang dipohon untuk disekat melalui injunksi adalah pada setiap masa matan di Malaysia. Tuntutan untuk wang jaminan tersebut telah dibuat di Malaysia. Terdapat pelbagai perintah yang dibuat terhadap dan menyebelahi pihak-pihak oleh mahkamah yang mempunyai bidang kuasa kompeten di Malaysia (lihat perenggan 24).

(5) Persetujuan defendan pertama dan defendan kedua untuk menyerah diri kepada bidang kuasa mahkamah Sudan, sebagaimana diperuntukkan dalam fasal 8 jaminan itu, tidak eksklusif. Selanjutnya, kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan telah mempertimbangkan isu-isu berkaitan logistik, kos prosiding, keadaan politik dan halangan geografi dalam melaksanakan litigasi tentang perkara ini di Sudan yang mana tiada sebab untuk tidak dipersetujui oleh mahkamah ini. Oleh itu, forum yang sesuai membuat litigasi untuk tindakan ini adalah Malaysia (lihat perenggan 24).]

Cases referred to

American Express Bank Ltd v Mohamad Toufiq Al-Ozeir & Anor [1995] 1 MLJ 160; [1995] 1 CLJ 273, SC (folld)

Diamond v Bank of London & Montreal [1979] 1 QB 333, CA (refd)

Malayan Banking Bhd v International Tin Council and another appeal [1989] 1 CLJ 961, SC (folld)

MatchPlan (M) Sdn Bhd & Anor v William D Sinrich & Anor [2004] 2 MLJ 424; [2004] 1 CLJ 810, CA (folld)

Nam Fatt Corp Bhd & Anor v Petrodar Operating Co Ltd & Anor [2011] 7 MLJ 305; [2010] 9 CLJ 732, HC (refd)

Petrodar Operating Co Ltd v Nam Fatt Corp Bhd & Anor [2012] 5 MLJ 445; [2012] 8 CLJ 311, CA (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

RIH Services (M) Sdn Bhd v Tanjung Tuan Hotel Sdn Bhd [2002] 3 MLJ 1; [2002] 2 AMR 2457, CA (refd)

Legislation referred to

Companies Act 1965 s 176

Courts of Judicature Act 1964 ss 23, 25(2)

Rules of the High Court 1980 O 11, O 11 r 1, O 11 r 1(1)(iii)(h), (1)(iii)(i), O 53

Appeal from: Civil Appeal Nos W-02(IM)-2196 of 2010 and

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W-02(IM)-2198 of 2010 (Court of Appeal, Putrajaya)

Kamaraj Nayagam (Shannon Rajan and Janice Tay with him) (Skrine) for the appellant.
GH Tee (GH Tee & Co) for the respondents.

Raus Sharif PCA (delivering judgment of the court):

INTRODUCTION

[1] There are two appeals before us: Civil Appeal No 02(i)-64–09 of 2012 ('first appeal') and Civil Appeal No 02(i)-65–09 of 2012 ('second appeal'). Both appeals arose out of the High Court's decision on 30 June 2010, which was upheld unanimously by the Court of Appeal on 13 March 2012.

[2] The first appeal is an appeal by the appellant against the decision of Court of Appeal in affirming the High Court's decision in dismissing the appellant's application to set aside or alternatively discontinue the ad interim injunction granted on the 3 May 2005 in relation to a performance guarantee. The second appeal is the appellant's appeal against the decision of the Court of Appeal in affirming the decision of the High Court in dismissing the appellant's application to set aside the concurrent writ of summons, notice of concurrent writ to be served outside jurisdiction, and the order granting leave to serve the notice of the concurrent writ, or alternatively for an order staying further proceedings on the ground that Malaysia is not the forum non conveniens.

[3] Leave to appeal was granted by this court on 6 August 2012 on the following questions of law:

First Appeal

Whether Order 11 of the Rules of the High Court 1980 confers jurisdiction or whether this is predicated on section 23 of the Courts of Judicature Act 1974 (given the apparent in consistencies between the Federal Court judgments in *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Another* [1995] 1 MLJ 160; [1995] 1 CLJ 273 and *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147.

The Second Appeal

a. Whether the Balance of Convenience test is applicable to Performance Bond Injunctions at an inter partes stage or this can be decided at the earliest possible stage;

b. Whether the High Court, upon staying the suit subject to an arbitration agreement and parties having pursued arbitration proceedings, retains jurisdiction to hear the injunction application on an inter partes basis.

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[4] At the High Court, the appellant in both these appeals is the first defendant and the first and second respondents are the plaintiffs. The second defendant (CIMB) is the issuer of the performance guarantee and not a party relevant to these appeals. In our judgment, for ease of reference, parties will be referred to their respective capacities as in the High Court.

BACKGROUND FACTS

[5] The background facts have been laid down adequately in the grounds of judgment of the learned judicial commissioner ('JC') reported in [2011] 7 MLJ 305; [2012] 9 CLJ 732 and in the grounds of judgment of the Court of Appeal reported in [2012] 5 MLJ 445; [2012] 8 CLJ 311. Thus, we do not propose to repeat them here except to the state the salient facts which are essential in determining the issues raised in these appeals as follows:

(a) NF Energy Sdn Bhd ('the second plaintiff') a subsidiary of Nam Fatt Corp Bhd ('the first plaintiff'), entered, through the vehicle of a joint venture company ('JV') into a contract with Petrodar Operation Co Ltd ('the first defendant') an offshore company, to carry out construction works on a project in Sudan. As required under the contract, the second plaintiff provided a performance bond ('the guarantee') in favour of the first defendant, the owner of the project. The guarantee was issued by CIMB Bank (L) Ltd ('CIMB') who is the second defendant. The parties agreed that the contract and the guarantee would be governed by the laws of Sudan;

(b) the project was substantially completed but dispute arose between the JV and the first defendant regarding claims for variation works done and charges to the JV's original works which the plaintiffs' claim that the first defendant had refused to certify or pay. Parties then negotiated for a settlement but while the negotiation for settlement was going on, the first defendant attempted to make a call on the guarantee. Viewing the call as fraudulent and unconscionable, the plaintiffs quickly filed a writ and a statement of claim against the first and second defendants respectively. On 18 March 2010 the plaintiffs obtained an ex parte ad interim restraining order pursuant to s 176 of the Companies Act 1965 from the Shah Alam High Court restraining the defendants by themselves or by their servants or agents from taking any action to enforce the guarantee or from taking any proceeding whatsoever or from appointing receivers and managers under the security except with leave of the court. On 13 April 2010 the plaintiffs obtained an ex parte injunction to restrain the first defendant from receiving the money under the guarantee or from making a call on and receiving any proceed under the guarantee pending inter partes hearing;

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(c) the plaintiffs then obtained leave of court to serve out of jurisdiction the writ of summons as well as the injunction order and other related cause papers to the first defendant. In the meantime an ad interim order was made on the 3 May 2010 to preserve the status quo until disposal of the inter partes hearing. Against this backdrop, the first defendant entered conditional appearance on 7 June 2010; and

(d) on the 16 June 2010 the first defendant applied vide encl (35) to set aside the concurrent writ of summons, notice of concurrent writ to be served out of jurisdiction and the leave order dated 15 April 2010 to serve out of jurisdiction. Further thereto the first defendant also filed an application vide encl (43) to set aside the ad interim injunction.

THE HIGH COURT

[6] The learned JC dismissed both the first defendant's application vide encls (35) and (43) on 20 June 2010 save that a stay of proceeding was granted pending the reference of the dispute to arbitration. The stay granted was subject to the first defendant paying interest at the rate of 3%pa of the guarantee sum of RM18m every quarter by the 30th day of the commencement of each quarter to the first defendant's solicitors client's account. Given that the application to set aside the ad interim injunction was dismissed, the learned JC decided to proceed with inter partes hearing of the injunction. On the 30 August 2010 the inter partes injunction was heard and dismissed by the learned JC. Flowing from this, the order pertaining to the payment of interest sum given on 20 June 2010 was also reversed.

[7] In coming to the above decision the High Court was of the view that:

(a) the first defendant had not submitted, succumbed nor surrendered to the jurisdiction of the court merely because they had objected to the ad interim injunction;

(b) the Malaysian court have jurisdiction over a foreign defendant under O 11 r 1 of the Rules of the High Court 1980 ('the RHC') as jurisdiction is implicit in the power to grant leave for service out of jurisdiction;

(c) the plaintiffs' case of fraudulent demand was cast as a tort committed within the jurisdiction, and the Malaysian court had jurisdiction under O 11 r 1(1)(iii)(h) of the RHC;

(d) the Malaysian court was the appropriate forum to try the action and it would be unjust to compel the plaintiffs to sue in Sudan. Although the law of contract was the law of Sudan, the decision on jurisdiction is quite different from the proper law of contract to be applied; and

(e) there was no material and valid ground adduced by the first defendant to justify the reversal of the ad interim injunction order.

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[8] Aggrieved by the aforesaid findings, the first defendant lodged separate appeals to the Court of Appeal appealing against the orders made by the learned JC in relation to the two applications filed.

THE COURT OF APPEAL

[9] On 13 March 2012 the Court of Appeal dismissed both the first defendant's appeals with costs. In so doing the Court of Appeal held, inter alia, that:

(a) the High Court was correct in holding that it had jurisdiction to hear the plaintiffs' claim. This was because the first plaintiff was a public listed company in Malaysia and Nam Fatt was its subsidiary. And the guarantee was issued on the plaintiffs' request by CIMB ('the second defendant') which had a place of business in Kuala Lumpur. Further, the alleged fraudulent and/or unconscionable demand on the guarantee was made in Malaysia and the plaintiffs' claim premised on a fraudulent demand was a tort that was committed in Malaysia;

(b) in the context of O 11 r 1 of the RHC, jurisdiction referred to jurisdiction over foreign defendant and not jurisdiction over the claim. Thus, where the court after having decided it had jurisdiction over the subject matter found the foreign defendant could not be served in Malaysia because he was not present here and had not submitted to its jurisdiction (like the first defendant), in such circumstances the court is allowed to statutorily assume jurisdiction over the foreign defendant under O 11 r 1 of the RHC if it is satisfied that any of the limbs under that provision applied. Viewed in that context, the High Court was not wrong in stating that Malaysia could have jurisdiction statutorily over a foreign defendant under O 11 r 1 of the RHC as jurisdiction was implicit in the power to grant leave for service out of jurisdiction;

(c) the fact showed that although the instructions to make the demand on the guarantee originated from the first defendant, the purportedly fraudulent and/or unconscionable demand was made in Malaysia at CIMB's office in Malaysia. Both the plaintiffs were in Malaysia. Accordingly, the evidence from witnesses on the issues of fact would be more readily available in Malaysia thereby making the trial in Malaysia more convenient; and

(d) the High Court was not in error in exercising its discretion not to set aside the ad interim injunction pending the inter partes hearing. The facts before the court at the ex parte stage were that the first defendant had made calls on the guarantee despite parties being in negotiation for a settlement and despite the fact that the JV had acceded to the first defendant's request for the guarantee to be renewed pending the settlement negotiations. The plaintiffs had averred that the demand was

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made as a tool or means of oppression or vexation against them and that, in the circumstance, the demand was fraudulent, unconscionable and/or invalid under the law.

FINDINGS

Question of law posed in the first appeal

Whether Order 11 of the Rules of the High Court 1980 confers jurisdiction or whether this is predicated on Section 23 of the Courts of Judicature Act 1974 (given the apparent inconsistencies between the Federal Court judgments in *American Express Bank Ltd v Mohamad Toufic Al-Ozeir & Another* [1995] 1 MLJ 160; [1995] 1 CLJ 273 and *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147.

[10] The way we perceive it, the question of law posed in this appeal is two fold, in that:

(a) firstly, we will have to consider whether O 11 of the RHC confers jurisdiction or whether this is predicated under s 23 of the CJA given the supposed inconsistencies between the abovementioned two apex court judgments concerning jurisdiction ie the then Supreme Court case of *American Express* and the Federal Court case of *Rama Chandran*. Put simply, whether O 11 of the RHC on its own confers jurisdiction or that it is predicated under s 23 of the CJA; and

(b) secondly, we will endeavor to determine whether there is indeed inconsistencies in the aforesaid two apex court decisions.

[11] In regard to the first part of the question of law posed, learned counsel for the first defendant submitted that although the case of *American Express* clearly states that O 11 of the RHC confers jurisdiction, however, the case of *Rama Chandran* is the authority for the proposition that the Rules of Court on its own cannot confer statutory jurisdiction. We have anxiously deliberated on this issue and with respect we find that the first defendant's submission on this point is misconceived. The then Supreme Court case of *Malayan Banking Bhd v International Tin Council and another appeal* [1989] 1 CLJ 961 in considering whether s 23 of the CJA confers extra-territorial jurisdiction had clearly highlighted that O 11 of the RHC is clothed with the same powers. His Lordship Mohd Azmi SCJ in delivering the judgment of the court held that:

> *Apart from O 11 r 1 of the Rules of the High Court 1980, s 23(1)(b) of the Courts of Judicature Act 1964 provides extra-territorial jurisdiction to the High Court in cases where oversea foreigners are sued as co-defendants ...* (Emphasis added.)

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[12] From the above quoted passage, it is clear that the then Supreme Court acknowledged the fact that O 11 of the RHC does confer jurisdiction. His Lordship Gopal Sri Ram JCA (as he then was) in the case of *MatchPlan (M) Sdn Bhd & Anor v William D Sinrich & Anor* [2004] 2 MLJ 424; [2004] 1 CLJ 810 in referring to the then Supreme Court case of then *Malayan Banking Bhd* took pains to set out how O 11 of the RHC and s 23 of the CJA are to be construed. His Lordship has this to say:

> Once the court is seized of extra-territorial jurisdiction by virtue of s 23(1) of the CJA, O 11 r 1 ceases to be of jurisdictional relevance. The decision in *Malayan Banking Berhad v International Tin Council* make it plain that O 11 r 1 assumes jurisdictional importance only in cases falling outside the scope of s 23(1). Accordingly, in cases where s 23(1) applies, O 11 r 1 becomes a mere procedural formality to enable a plaintiff to effect service abroad. In the present case, if the plaintiffs are right in their argument on the facts, then this is a case that falls both under s 23(1)(a) and (c) of the Courts of Judicature Act as well as under par (h) of O 11 r 1 which empowers the court to grant leave to a plaintiff to serve a writ out of jurisdiction 'if the action begun by the writ is founded on a tort committed within the jurisdiction'. So it does not really matter which of these provisions is relied upon to found jurisdiction in this case.

[13] We see no necessity to regurgitate what had been so admirably explained by His Lordship Gopal Sri Ram in the case of *MatchPlan Malaysia*. As such, premised on the decision of *Malayan Banking Berhad* and *MatchPlan Malaysia* we are of the considered view that O 11 of the RHC does not only confers jurisdiction but that it stands independently on its own and is not predicated upon, s 23 of the CJA 1964.

[14] Next we turn to the second part of the question of law posed ie whether are there indeed any inconsistencies between the then Supreme Court decision of *American Express* and the Federal Court case of *Rama Chandran*. Foremost, the case of *American Express* dealt with the ramifications and the principles governing the operation of O 11 of the RHC. In that case, the appellant ('the bank') was a foreign bank based in Singapore. Sometime in 1992, the bank entered into two agreements with Mohamed Toufic Al-Ozeir and another ('the customers') who were residents in Malaysia, to assist the latter in some foreign exchange transactions. These agreements were executed in Singapore. Information and advice pertaining to the transactions were then passed by the bank to the customers in Kuala Lumpur and following that several foreign exchange transactions were executed in London, New York and Singapore. By the said agreements, both parties agreed to submit to the jurisdiction of Singapore Court and be governed by the laws of Singapore. The customers suffered losses from the transaction. They filed a writ action in Kuala Lumpur High Court and claimed damages for fraudulent misrepresentation. Leave to issue and service of the notice of writ of summons out of jurisdiction on the bank was granted by the deputy registrar. On 24 December 1993, the bank

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applied to the High Court judge to set aside the said leave and pleadings on the ground that the Malaysian court's lack of jurisdiction to try the case and the Singapore courts is of forum non conveniens.

[15] The learned High Court judge dismissed the application and ruled on the authority of *Diamond v Bank of London & Montreal* [1979] 1 QB 333, that the tort of fraudulent misrepresentation, when made by telephone or telex, was committed at the place where the message was received and acted on, and not at the place it was sent, and on that ground held that the tort in this case was committed in Malaysia, thus giving the Malaysian court jurisdiction to hear the case. According to the learned judge further, the fact that the tort was committed in Malaysia overrode all other considerations and the plea of forum non conveniens must also therefore fail. Aggrieved by the said decision the bank appealed to the then Supreme Court.

[16] Before the Supreme Court the primary issues that arose were: (a) whether on the facts the High Court in Malaysia had jurisdiction to hear the action and (b) whether in circumstances of that case the Malaysian High Court was or was not the forum conveniens. As for the first issue the Federal Court held that a Malaysian court has the jurisdiction over a foreign defendant at common law if the said defendant is residing in Malaysia or if he submits to jurisdiction if not so present. However, if he is present here and has not submitted to jurisdiction, the Malaysian court can assume such jurisdiction statutorily under O 11 r 1 of the RHC, as jurisdiction is implicit in the power to grant leave by the High Court for service out of jurisdiction. Further O 11 r 1(h) of the RHC expressly provides for service out of jurisdiction 'if the action begun by writ is founded on a tort committed within the jurisdiction'. Thus, it was held that, although the bank was not present within jurisdiction and had not submitted to the jurisdiction of the Malaysian court, the facts remains that the statement of claim was cast in tort committed in Malaysia. The Malaysian court therefore had jurisdiction to entertain the customers' claim. Having found that the Malaysian court had the jurisdiction to hear this case the Supreme Court embarked upon the exercise to ascertain whether the Malaysian court was a suitable or more appropriate forum to adjudicate this claim. After due consideration the Supreme Court found that the customers had clearly failed to satisfy that the Malaysian court was the most appropriate forum to try the action. The Supreme Court found that the Singapore court is the more suitable forum to try this action. The facts showed that except for the fact that the alleged fraudulent and misleading information form the bank to the customers were received by the customers in Kuala Lumpur, all other transactions had taken place outside Malaysia. The relevant securities of the customers were also deposited with the bank in Singapore and London and not in Malaysia. The Supreme Court found that although both the customers were residents in Malaysia, the main protagonist from the bank's camp were

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A residents outside Malaysia, either in London or Singapore. The Supreme Court took cognisance of the fact that there were no peculiar difficulties which the customers would face apart from the inconvenience and expenses of adjudicating this action if it was heard in Singapore.

B **[17]** The case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 (Rama Chandaran) on the other hand dealt with different issues not akin to issues pertaining to jurisdiction. It is a case involving dismissal of an employee where the Industrial Court held
C that the appellant ('Rama') was dismissed with just cause and excuse. Rama's application to the High Court to quash the decision of the Industrial Court was refused. However, his appeal to the Federal Court was allowed and the Industrial Court's award was accordingly quashed. The consequential issue that arose in that case was whether the Federal Court has the jurisdiction to grant
D Rama compensation for loss of employment, without the necessity of remitting the case to the Industrial Court with the discretion to make the necessary consequential orders. The Federal Court by majority held that it had the jurisdiction to do so in order to avoid injustice of further delay and expenses to Rama.

E **[18]** In our considered view *Rama Chandran* must be read in the particular context of the facts in that case, and clearly it has nothing to do with the jurisdiction of Malaysian court over foreign defendant. As we have said earlier the issue before the Federal Court in *Rama Chandran* was whether the Federal
F Court had powers to remit the case back to Industrial Court for consequential relief and whether Federal Court or High Court may grant consequential relief. The pertinent point which was given due deliberation by the Federal Court in *Rama Chandran* was to the issue of jurisdiction of court ie whether appellate or supervisory. It is in this context that the Federal Court endeavored to discuss
G that the Rules of the Court is merely to regulate procedure ie the machinery to exercise jurisdiction and do not extend into the area of substantive law which is the source of jurisdiction.

[19] It is important for us to highlight here that the decision of the Federal
H Court in *Rama Chandran* centered on the construction of s 25(2) of the JCA and the powers of the court under O 53 of the RHC. Thus, it is our view that the decision does not in any way affect the then Supreme Court's decision in *American Express Bank*. Thus, we hold that the decision in *American Express Bank* is still valid, and we have no reason to depart from it. Further to the
I foregoing, we agree with the findings of the Court of Appeal that in the context of O 11 r 1 of the RHC, jurisdiction referred to jurisdiction over a foreign defendant and not jurisdiction over the claim. Thus, where the court after having decided it had jurisdiction over the subject matter found the foreign defendant could not be served in Malaysia because he was not present here and

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had not submitted to its jurisdiction (like the first defendant), in such circumstances the court is allowed to statutorily assume jurisdiction over the foreign defendant under O 11 r 1 of the RHC if it is satisfied that any of the limbs under that provision applied. Viewed in that context, the High Court was not wrong in stating Malaysia could have jurisdiction statutorily over a foreign defendant under O 11 r 1 of the RHC as jurisdiction was implicit in the power to grant leave for service out of jurisdiction. As for the issue of whether this is a proper case for service out of jurisdiction we are satisfied that the plaintiffs have successfully grounded their application within the confines of O 11 r 1(iii)(i) of the RHC 1980. The present action brought by the plaintiffs falls within O 11 r 1(1)(iii)(i) of the RHC 1980 as the plaintiffs' present action is begun by writ seeking an injunction to refrain the first defendant from doing anything within the jurisdiction, namely to refrain from receiving the money demanded in respect of the guarantee. Further, the plaintiffs' reliance on O 11 r 1(1)(iii)(h) is proper as the said order permits the service of a writ out of jurisdiction if the action begun by the writ is founded on a tort committed within the jurisdiction. Hence in our judgment for the reasons aforesaid we find that the Malaysian courts have jurisdiction over the foreign defendant as in this case. To this end we are also satisfied that the plaintiffs have successfully confined their application within salient provisions of O 11 of the RHC to effect service out of jurisdiction.

[20] Next we move on to the issue of forum non conveniens. In discussing the issue of forum non conveniens one cannot escape from the reasoning's postulated in the case of *American Express*, wherein the then Supreme Court was of the view that forum non conveniens refers to the suitability or appropriateness and not convenience itself. The fundamental principle governing this maxim is that whether there is some other tribunal, having competent jurisdiction, in which the case can be tried more suitably for the interest of all parties to meet the ends of justice. A good guide for court in deliberating on the issue of forum non-convenience was well set out in the foregoing passage of His Lordship Peh Swee Chin's judgment which is reproduced herein below as follows:

> In our view, where an application by a defendant for stay of proceedings is concerned, in applying the said doctrine, the defendant would have to satisfy the court that 'some other forum is more appropriate' per Lord Templeman in the *Spiliada*. Where on the other hand, leave to issue and serve out of jurisdiction a notice of writ of summons under O 11 r 1 of the RHC s involved then according to the reasoning of Lord Templeman, the plaintiff, (not the defendant, be it noted) would have to satisfy a Malaysian court that, by comparison, that Malaysian court is the most appropriate forum to try the action. Thus, it will be seen that in the instant case the burden lay on the bank customers, the plaintiffs to satisfy the High Court below that Malaysia was the most appropriate forum.
>
> Having regard to the reasoning of the learned Law Lords in the *Spiliada* and the

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A learned joint article aforesaid, we are of the considered view that in all cases of either a defendant's application for stay of proceedings or a plaintiff's application for leave to serve out of jurisdiction under O 11 r 1 of the RHC, or for setting aside such leave, it will be obligatory for a Malaysian court to consider in any event, a most important factor ie whether 'it would be unjust to the plaintiff to confine him to remedies elsewhere'. It is indispensable when a Malaysian court considers all cases in connection with forum non conveniens.

The most important factor described above does arise, of course, out of a great variety of factors that a Malaysian court ought to consider in applying the said doctrine; the prominent one being that whether any particular forum is one with which the action has the most real and substantial connection. One can easily visualise a large number of factors which overlap with one another.

[21] In *American Express* there was an express clause in the agreement that parties chose the Singapore courts for litigation. This is a point of considerable significance which His Lordship Peh Swee Chin took cognisance of and later held that:

We considered the relevant factors in this instant appeal. A very glaring factor in the instant appeal was the foreign jurisdiction clauses in both the said agreements as set out above by which the bank customers had chosen Singapore courts for the litigation ie, expressly, in other words, the bank customers had submitted to the jurisdiction of the chosen Singapore courts; and further both parties had chosen Singapore law as the law of their choice for the litigation, prospective or otherwise.

It would be clear that, notwithstanding such clauses, a Malaysian court ie High Court below, could not be precluded simpliciter thereby from exercising the discretion, according to the doctrine of forum non conveniens, as to whether to hear the instant case or not, please see Federal Court's case of *Globus Shipping & Trading Co (Pte) v Taiping Textile Bhd* [1976] 2 MLJ 154; [1976] 1 LNS 31.

(Emphasis added.)

[22] From the plain reading of His Lordship Peh Swee Chin's reasoning on the existence of such jurisdictional clause which sets out the manner in which parties would litigate in case of any dispute, we can safely conclude that notwithstanding the presence of such a clause the Malaysian court ie the High court below, could not be precluded simpliciter thereby from exercising the discretion, according to the doctrine of forum non conveniens, as to whether to hear the instant case or not. In *American Express* based on the facts and circumstances it was held that:

... except for the fact that the alleged fraudulent and misleading information or instructions from the foreign bank to the bank customers were received by the bank customers in Kuala Lumpur, all 127 foreign exchange transactions had taken place, outside Malaysia, in London, New York and Singapore and all the securities of the customers were deposited with the foreign bank in Singapore and London. The bank customers who were husband and wife, were residents in Malaysia; but the

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main protagonists from the foreign bank's camp were residents outside Malaysia, either in London, or Singapore. There were no peculiar difficulties which the bank customers would face apart from the inconvenience and expenses in crossing the causeway to Singapore which was more suitable as a forum. The bank customers, as plaintiffs, had plainly failed to satisfy the court that the Malaysian court was the most appropriate forum to try the action which they launched.

[23] It is clear from the above, the Supreme Court in *American Express* was satisfied based on the facts and circumstances which is peculiar to that case that it was much suitable for the case to be adjudicated in Singapore. Reverting back to the case at hand, it therefore behoves us to consider whether Malaysia is the appropriate forum to adjudicate this matter. In our judgment we are satisfied that the High Court and the Court of Appeal being guided by the principles enunciated in the case of *American Express* had rightfully embarked upon sound reasoning to ascertain which is the natural forum for trying this case. The hard facts of this case would clearly reflect that the performance guarantee was issued in Kuala Lumpur by a Malaysian bank having a place of business in Kuala Lumpur. The guarantee money sought to be restrained by an injunction was at all material times in Malaysia. The demand for the said guarantee money was made in Malaysia. There were various orders made against and in favour of parties as we have elaborated at the earlier part of this judgment by the court having competent jurisdiction within Malaysia. More importantly the first and second defendant's agreement to submit to the jurisdiction of the Sudan courts was non-exclusive. This is clearly provided for in cl 8 of the performance guarantee wherein it clearly stipulates that *'This Performance Guarantee shall be governed by and construed according to the laws for the time being in force in Sudan and the SURETY agrees to submit to the non-exclusive jurisdiction of the Sudan Courts'*. (Emphasis added.)

[24] Further to the foregoing, both the High Court and Court of Appeal had deliberated on issues pertaining to logistics, costs of proceedings, political climate and geographical constraints in having this matter litigated in Sudan. We find no reasons to disagree with the High Court and Court of Appeal on this point. More importantly, given that the findings of the High Court and the Court of Appeal was essentially based on questions of facts, we are reluctant to interfere with such findings. Thus, in our judgment, the appropriate forum to litigate this action is Malaysia. Under the circumstances we will answer the question of law posed in the first appeal in the negative.

Questions of law posed in the second appeal

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First question

(a) Whether the balance of convenience test is applicable to performance bond injunctions at an inter parties stage or this can be decided at the earliest possible stage;

[25] The question now is, whether it is proper to split the hearing of interim injunction application by separating the balance of convenience argument to be argued and heard separately to set aside an ad interim injunction. We have considered the submissions urged on us by learned counsel for the first defendant and with respect we are unable to accede to their contentions. It is the standard practice of our courts, that after the grant of the ad interim injunction (pending the inter partes hearing) to move on to the hearing of the inter partes injunction. Parties will then ventilate all issues and their respective contentions in the inter partes hearing of the injunction itself. In this regard we are reminded of the observations made by His Lordship Abdul Hamid bin Mohamed JCA (as he then was) in *RIH Services (M) Sdn Bhd v Tanjung Tuan Hotel Sdn Bhd* [2002] 3 MLJ 1; [2002] 2 AMR 2457 which we are inclined to adopt in similar vein. His Lordship Abdul Hamid bin Mohamed JCA noted that the ad interim injunction to maintain the status quo pending the inter partes hearing is quite often agreed between the parties. Even if they do not agree the court has the jurisdiction to make such an order. The court has the jurisdiction to grant the ad interim injunction even in the event the parties disagree. From the observations made by His Lordship Abdul Hamid Mohamed we can safely conclude that in the interest of smooth and expeditious administration of justice, parties should expeditiously move forward to the hearing of the inter partes injunction on the merits. Under the circumstances we find that it is not desirable to split the subject matter of a separate interlocutory application to set aside an ad interim injunction concurrently with the opposition to the inter partes injunction just on the issue of balance of convenience. As rightfully pointed out by learned counsel for the plaintiffs that to pick up an argument on balance of convenience issue and split it into the subject matter of a separate interlocutory application to set aside the ad interim injunction would result in multiplicity of proceedings and is a wastage of time and costs. In our judgment we find that it is more desirable and appropriate that the question of balance of convenience be argued and decided at the inter partes stage of hearing of the injunction. Thus, we find that the learned JC did not err in his findings on this point and he had correctly directed his mind to the relevant issues at hand when he held that:

> Following the Supreme Court case of *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149; [1995] 1 CLJ 283 at pp 158–159, and applying *American Cynamid v Ethicon* [1975] 2 WLR 316, without the need to ascertain in a kind of detailed analysis the respective strength of the parties herein at this application to set aside the ad interim injunction stage, I am satisfied that on the

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surface at least, that there are serious questions for trial and even though they were not that serious, but nevertheless they could not be described as frivolous or vexatious. A more mature consideration of this issue of a serious questions to be tried can be further had at the hearing at the inter parte stage.

[26] In deliberation on the aforesaid question of law posed to us we are also mindful of the fact that the ad interim injunction which formed the subject matter of the first defendant's application to set aside the ad interim injunction was discharged by the High Court on 30 August 2010 at the inter partes hearing of the same. Having said that we are inclined to agree with the submissions of learned counsel for the plaintiffs that there is at the moment no live subject matter for us to consider in the first defendants appeal in the present case, after the first defendant's application to set aside the ad interim injunction had been dismissed by the High Court and the appeal therefrom was dismissed by the Court of Appeal. Clearly, for the aforesaid reasons there is no purpose to pursue this issue any further. Accordingly in our judgment the balance of convenience question is academic as the ad interim injunction, which formed the subject matter of the first defendant's application to set aside the ad interim injunction, was already discharged by the High Court on 30 August 2010 after the High Court heard the inter parte application for injunction. For the reasons adumbrated above we will answer the first question of law posed in the second appeal in the negative.

Second question

(b) Whether the High Court, upon staying the suit subject to an arbitration agreement and parties having pursued arbitration proceedings, retains jurisdiction to hear the injunction application on an inter parties basis.

[27] The last question posed in the second appeal needs no in depth consideration. We are of the view that based on what had transpired in this case, there is no necessity to answer the second question. Firstly, the appellant did not appeal against the High Court's decision in respect of the stay granted. Secondly, the facts do not support the first defendant's case. In the present case the High Court order dated 30 June 2010 had granted a stay on part of the High Court suit pending arbitration in respect of the second plaintiff and the first defendant on terms, inter alia, that the application for the inter partes injunction be proceeded with and be heard and disposed of in the High Court. Not all parties were involved in the arbitration proceedings. This is the reason why the inter partes injunction and the other issues between the plaintiffs and the second defendant were expressly excluded for stay. This is clearly reflected in the order of the court dated 30 June 2010 which was drafted and agreed upon by the parties. We must not lose sight of the fact that the first defendant had conformed to the order and latter participated in the hearing of the inter

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partes injunction without objecting to the High Court's jurisdiction in proceeding with the inter partes application after the stay order was granted. The Court of Appeal did not make a finding as to the stay order as there was no appeal preferred against the same. To dwell upon this question now will be an exercise in futility. Under the circumstances we decline to answer the second question posed in the second appeal as in our considered view it does not have any impact on the outcome of this appeal one way or the other.

[28] In the upshot, we hereby answer the questions posed to us in the first appeal in the negative. We hereby also answer the first question posed to us in the second appeal in the negative. For the reasons given, we find it unnecessary to answer the second question posed in the second appeal. In conclusion the first defendant's appeals being devoid of merits stands dismissed with costs.

Appeals dismissed with costs.

Reported by Afiq Mohamad Noor